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Clinton Scott Waldock

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EXAMINER

BADR, HAMID R

ART UNIT

PAPER NUMBER

1781

MAIL DATE

DELIVERY MODE

08/03/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action

Applicants' amendment after final rejection filed 7/12/2010 is acknowledged.

The rejection of claim 16 and 17 under 35 U.S.C. 112 second paragraph is hereby withdrawn per Applicants' remarks/claim cancellation.

1. The rejection of claims 1-18 under 35 U.S.C. 103(a) over McNamee et al. (GB 2,291,578; hereinafter R1) in view of Croker et al. (US 5,711,791; hereinafter R3) is hereby withdrawn per Applicants' persuasive remarks.
2. The rejection of claims 1-18 under 35 U.S.C 103(a) over McNamee et al. (GB 2,291,578; hereinafter R1) in view of Pasternak (US 4,670,271; hereinafter R2) is maintained.
3. Applicants' amendment after final rejection is entered for appeal purposes.

Response to Arguments

Applicants' arguments regarding the rejection of claims 1-18 over R1 in view of R2 are not persuasive for the following reasons.

1. Applicants argue that McNamee (R1) fails to disclose ink components recited in the presently claimed invention.
 - a. The rejection of claims 1-18 is an obviousness type rejection involving two references, therefore the references are not to be attacked individually. Application of a marking material/ink to the surface of a dough before baking and the subsequent stage of baking the product is clearly disclosed by R1. The edible ink concept and the compositions comprising compounds as presently claimed is taught by R2.

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In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

2. Applicants argue that Pastermak (R2) discloses the sucrose content at 1-5% and the food coloring content is less than 1%.

a. R2 discloses that 1-50% of the sugars can be a combination of sucrose and other sugars including glucose and corn syrup. (col. 16, lines 30-31. This is the general disclosure by R2. The sucrose level of 1-5% as argued by Applicants is a preferred level. When sugars are taught to be 1-50%, by R2, levels of sucrose as presently claimed would be obvious.

The coloring matter disclosed by R2 is also at 2-80% of the ink. (col. 16, lines 36-38).

Applicants should consider all the teachings of a reference not only a preferred teaching.

3. Applicants argue that the ink of Pastermak is not used in a product that is subsequently baked.

a. The baking process of a dough to which an ink has been applied is disclosed by R1. R2, as a secondary teaching reference does not have to teach all the limitations of the claimed invention.

However, note that while R2 does not disclose all the features of the present claimed invention, R2 is used as teaching reference, and therefore, it is not necessary for this secondary reference to contain all the features of the presently claimed invention, *In re*

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Nievelt, 482 F.2d 965, 179 USPQ 224, 226 (CCPA 1973), *In re Keller* 624 F.2d 413, 208 USPQ 871, 881 (CCPA 1981). Rather this reference teaches a certain concept, and in combination with the primary reference, discloses the presently claimed invention.

4. Applicants argue that the ink composition taught by combining these two references still falls outside the claimed invention.

a. Applicants are referred to the teachings of R2 for the category of compounds and the ranges of such compounds for making edible inks. Compounds and their ranges as taught by R2 overlap with compounds and their ranges as presently claimed. The edible ink composition is therefore obvious in view of R2.

5. Applicants' arguments regarding rejection of claims 1-18 over R1 in view of R3 are moot due to the withdrawal of that rejection per Applicants' persuasive arguments.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAMID R. BADR whose telephone number is (571)270-3455. The examiner can normally be reached on M-F, 8:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Hamid R Badr
Examiner
Art Unit 1781

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1781